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No. 88-6677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HORACE BUTLER,

Petitioner,

v.

KENNETH D. MCKELLAR, Warden, et al.

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

I. PETITIONER'S *EDWARDS-ROBERSON* CLAIM IS NOT PROCEDURALLY DEFAULTED.

1. There Was No Procedural Default In The State Courts.

Respondents assert that the state post-conviction court found that petitioner's *Edwards-Roberson* claim was procedurally barred. Respondents' Brief at 28-29. Respondents' contention is based entirely on one paragraph in the state post-conviction court's order in petitioner's case. The relevant portion of the order is as follows:

> In allegation VII, the Applicant contends that his confession was improperly introduced. This issue has been substantially disposed of in the ineffective assistance of counsel claim. As presented in this allegation, this Court lacks jurisdiction based upon the Supreme Court's mandate in *Simmons* v. *State*, *supra*. For the reasons set out previously, this allegation is without merit and is dismissed.

J.A. 89. Respondents interpret this excerpt from the post-conviction court's order to mean that petitioner's claim was procedurally barred because it was not raised on direct appeal. Respondents' brief at 29. For the reasons that follow, respondents' assertions are meritless.

Respondents rely on *Simmons* v. *State*, 264 S.C. 417, 215 S.E. 2d 883 (1975), as establishing the state rule of procedure which petitioner transgressed, i.e., that claims which are not raised on direct appeal may not subsequently be raised in post-conviction proceedings. Respondents' argument, however, is based on an incorrect reading of the South Carolina Supreme Court's *Simmons* decision. In fact, *Simmons* applies to several categories of claims, and holds that "errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." 264 S.C. at 419, 215 S.E. at 885. Thus, the

post-conviction court's citation of *Simmons* does not necessarily mean that it found petitioner's *Edwards-Roberson* claim to be defaulted. Rather, it could mean that the claim was addressed on direct appeal and thus cannot be reasserted in collateral proceedings, or that it was not presented or considered at all. To properly determine the meaning of the state court's reference to *Simmons* in petitioner's case, it is necessary to examine the law of procedural default in South Carolina as it is applied in capital cases.

In cases in which a defendant is sentenced to death, the South Carolina Supreme Court, for over a hundred years, has taken upon itself the obligation of reviewing the entire record to determine whether there was any prejudicial error. *See, e.g., State* v. *McNinch*, 12 S.C. 89 (1879); *State* v. *Diddlemeyer*, 296 S.C. 235, 238, n.1, 371 S.E.2d 79 (1988). This doctrine is referred to in South Carolina as *in favorem vitae*. *Id.* Pursuant to *in favorem vitae*, the failure to raise a claim either at trial or on direct appeal does not create a procedural default. *See, e.g., State* v. *Brown*, 296 S.C. 191, 192, 371 S.E.2d 523, 524 (1988); *State* v. *Cockerham*, 294 S.C. 380, 365 S.E.2d 22 (1988); *State* v. *Riddle*, 291 S.C. 232, 235, 353 S.E.2d 138, 140 (1987); *State* v. *Pierce*, 289 S.C. 430, 435, 346 S.E.2d 707, 710 (1986); *State* v. *Drayton*, 287 S.C. 226, 228, 337 S.E.2d 216, 217 (1985); *State* v. *Peterson*, 287 S.C. 244, 246, 335 S.E. 2d 800, 801 (1985), *State* v. *(James) Butler*, 277 S.C. 543, 546, 290 S.E.2d 420, 421 (1982), *State* v. *Adams*, 277 S.C. 115, 119, 283 S.E.2d 582, 584 (1981). In fact, the South Carolina Supreme Court has reversed capital convictions and death sentences on grounds not raised by the appellants at any stage of the trial or appellate process. *See State* v. *Patterson*, 278 S.C. 319, 320-321, 295 S.E.2d 264, 264-65 (1982); *State* v. *Gilbert*, 273 S.C. 690, 695-696, 258 S.E.2d 890, 894 (1979).

Furthermore, the South Carolina Supreme Court has reversed death sentences on the basis of claims raised for the first time in the collateral proceedings. In *Thompson* v. *Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984), for example, the South Carolina Supreme Court granted post-conviction relief on the basis of a claim of improper prosecution jury argument which was raised for the first time on collateral attack after the death sentence had become final on direct appeal. *See also Yates* v. *Aiken*, 290 S.C. 232, 234, 349 S.E.2d 84 (1986), *rev'd* 484 U.S. 211 (1988).[1]

Thus, in this context, the post-conviction court's reliance on *Simmons* must mean that petitioner's Fifth and Sixth Amendment claims were addressed by the South Carolina Supreme Court when it reviewed the record *in favorem vitae* and affirmed his conviction and sentence of death, and, therefore, that the claims could not be "re-raised" during the post-conviction process.[2] This is

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[1] Respondents' counsel in this case advanced a similar and equally meritless procedural default argument, again for the first time in this Court, in his brief in *Yates* v. *Aiken*, *supra*. In *Yates*, as here, the petitioner had not raised his constitutional claim either at trial or on direct appeal, but rather asserted it for the first time in collateral proceedings. *See Yates* v. *Aiken*, 290 S.C. at 234, 349 S.E.2d at 86. In *Yates*, as here, the state attorney general attempted to assert a nonexistent state rule of procedural default in order to convince this Court that it should not reach the question which it had granted certiorari to consider. *Yates* v. *Aiken*, *supra*, Brief of Respondents. The Court unanimously rejected the Attorney General's procedural argument in *Yates*, 484 U.S. 211 (1988), and his present argument is no more meritorious.

[2] The South Carolina Attorney General has adopted precisely this

shown by the fact that in the sections preceding the discussion of petitioner's Fifth and Sixth Amendment claim, the state post-conviction court, again relying on *Simmons* v. *State*, *supra*,[3] found in relation to another issue raised by petitioner, that because the Supreme Court of South Carolina had reviewed the "'entire record for any prejudicial error and [found] none,'" the matter could not be "reasserted in these proceedings which are not a substitute for an appeal." J.A. 89. The court made this same statement in petitioner's case, with reference to *Simmons*, in regard to claims which were not raised at all on direct appeal, claims which were raised by formal exception but not briefed,[4] and claims which were raised on

position in other cases. For example, in *Owens* v. *McKellar*, No. 88-CP-26-605 (Horry County Court of Common Pleas, Order filed April 10, 1989), a case involving a post-conviction claim that a death-sentence inmate's appellate counsel had been ineffective by failing to raise certain trial errors on direct appeal to the South Carolina Supreme Court, the Attorney General successfully argued that appellate counsel because the South Carolina Supreme Court, pursuant to its *in favorem vitae* review in all capital cases, had necessarily addressed and implicitly rejected the claims at issue when the defendant's case was before it on direct appeal. *See id.*, Respondents' Trial Brief at 65, 99-102.

[3] *Simmons*, *supra*, was not a capital case and thus did not involve the ramifications of the South Carolina Supreme Court's *in favorem vitae* doctrine as to issues raised for the first time in collateral proceedings. In cases in which the death penalty is not imposed—even cases where the state seeks the death penalty but a sentence of life imprisonment is returned—the South Carolina Supreme Court rigorously enforces state rules of procedure, including a contemporaneous objection rule. *See, e.g.*, *State* v. *Sosebee*, 284 S.C. 411, 326 S.E.2d 654 (1985).

[4] In a non-capital case in South Carolina, the failure to raise a claim in the appellant's brief that is included in the appellant's proposed case and exceptions—the pleading under state law that sets out the

direct appeal and raised again in Butler's application for post-conviction relief. J.A. 88-89. Thus the order in its entirety makes clear that the court did not find that petitioner's claim was defaulted.[5]

Even if the lack of a state procedural bar were not as clear as it is on these facts, the post-conviction court's order is certainly ambiguous as to whether it determined that there was a procedural default in petitioner's case. Because the relevant portion of the order standing alone could mean that the *Edwards-Roberson* claim was consid-

issues which will be raised in the brief—creates a procedural default. *See, e.g.*, *State* v. *Vaughn*, 268 S.C. 119, 232 S.E.2d. 328 (1977). However, like other procedural rules, this requirement is relaxed in capital cases. *See, e.g.*, *State* v. *Brown*, *supra*; *State* v. *Patterson*, *supra*.

[5] Furthermore, even had the state court determined that the claim was procedurally defaulted, the holding could not stand. In *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958), this Court realized that a new rule of procedure cannot be established and used to an individual's detriment for the first time in his case. The Court noted: "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 457-58; *see also NAACP* v. *Alabama ex. rel. Flowers*, 377 U.S. 288, 301 (1964); *Wright* v. *Georgia*, 373 U.S. 284, 290-91 (1963). Similarly, a procedural default ruling in petitioner's case could not satisfy this Court's requirement that the state procedural rule relied on by the state court be consistently and regularly applied, as similar claims are routinely addressed on the merits in state post-conviction proceedings in South Carolina capital cases. *See Johnson* v. *Mississippi*, 486 U.S. ____, 108 S.Ct. 1981 (1988). Thus, even assuming the state post-conviction court found the claim to be procedurally defaulted—which it did not—this holding would not be in accordance with a "strictly or regularly followed" state procedural requirement. *See Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964).

ered and rejected on the merits by the South Carolina Supreme Court on direct review, or that it could not be addressed because it was not raised, it is, at the very least, uncertain whether "the state court . . . actually relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985). This is, by definition, the type of ambiguous state court holding that fails to satisfy the "plain statement" requirement of *Harris* v. *Reed*, ___ U.S. ___, 109 S.Ct. 1038, 1044-45 (1989) (holding that state court must clearly and explicitly rely on any available state law procedural ground, and that if the decision of the state court does not contain such a "plain statement," then a federal court must address the merits of the claim).

Finally, not only did the state court not find petitioner's claim to be procedurally defaulted, it also addressed petitioner's claim on its merits. In the portion of the order relied upon by respondents, the court determined that petitioner's *Edwards-Roberson* claim "has been substantially disposed of in the ineffective assistance of counsel claim." J.A. 89. During its consideration of petitioner's allegations of ineffective assistance of counsel, the court found that petitioner's confession was not obtained in violation of South Carolina law or the United States Constitution. J.A. 84-85. Based on this disposition of petitioner's arguments, the court specifically stated, in regard to petitioner's substantive challenge to the admissibility of his statements: "[f]or the reasons set out previously, this allegation is without merit and is dismissed." J.A. 89. This is a ruling on the merits of petitioner's claim.

2. Respondent's Cannot Assert At This Point In The Proceedings That Petitioner's *Edwards-Roberson* Claim Is Procedurally Barred.

In the three and one-half years this case has been pending in the federal courts, respondents have never before raised any procedural defense. Had respondents sincerely believed that petitioner's *Edwards-Roberson* Claim was procedurally barred, they would surely have raised this defense before the magistrate, the district court, the Court of Appeals, or in their brief in opposition to the petition for writ of certiorari. They did not. Had they done so before lower federal courts familiar with South Carolina law and with habeas corpus proceedings involving South Carolina death-sentenced inmates, those courts would have immediately perceived the patent lack of merit in respondents' argument. *See generally Granberry* v. *Greer*, 481 U.S. 129, 136 n.9 (1987).[6] Furthermore, it ill serves justice to withhold such a procedural defense until a case has arrived before the court least familiar with the pertinent details of state procedure. That is part of the

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[6] Death sentenced inmates routinely raise, and have addressed on the merits in collateral proceedings in the state and federal courts, issues which were not raised at trial or on direct appeal, but were raised for the first time in post-conviction proceedings. *See, e.g., Hyman* v. *Aiken*, 777 F.2d 938 (4th Cir. 1985), *vacated and remanded*, 478 U.S. 1016 (1986), *relief granted* 824 F.2d 1405 (4th Cir. 1987) (*Enmund* v. *Florida*, 458 U.S. 782 (1982), claim raised for the first time in collateral proceedings); *Adams* v. *Aiken*, 3:86-1499-6(B) (D.S.C. Feb. 22, 1989); *Gilbert* v. *Aiken*, C.A. No. 2: 84-3792-2(H) (D.S.C. June 29, 1989). In fact, no federal court in the District of South Carolina or panel of the United States Court of Appeals for the Fourth Circuit has *ever* found a claim to be procedurally defaulted because it was not raised at trial or on direct appeal in a South Carolina capital case.

reason why all litigants—the state included—are obligated to raise any defenses they believe to be meritorious, and on which they intend to rely, at the earliest opportunity. The state's failure to do so may—and under the facts of this case should—result in the waiver of these defenses. *See, e.g., Granberry* v. *Greer*, 481 U.S. at 134; *Illinois* v. *Gates*, 462 U.S. 213, 221 (1983).[7]

Recognizing the difficulty in raising this defense, such as it is, in this Court for the first time, respondents assert in their brief that they have not previously asserted a procedural bar because the *Edwards-Roberson* claim was not expressly pleaded in the petition for writ of habeas corpus. Because of this purported defect in the original pleading, respondents assert that the discussion of petitioner's *Edwards-Roberson* claim by the magistrate, the federal district court, and the court of appeals all constituted "*obiter dicta*." Respondents' brief at 30-31. This is simply incorrect. While petitioner concedes the ground for relief was not artfully worded in the habeas petition, it plainly alleged that petitioner's statement was obtained in violation of the Fifth, Sixth and Fourteenth Amend-

[7] In *Granberry*, this Court determined that the state's failure to timely assert a defense that the petitioner had failed to exhaust his available state remedies could result in waiver of the exhaustion requirement. The *Granberry* Court held that a reviewing court must make this determination using an interests of justice analysis. The interests of justice in this case compel a conclusion that the state has forfeited an opportunity to raise any argument—no matter how frivolous—that petitioner's *Edwards-Roberson* claim is procedurally barred. Certainly, the interests of justice do not permit respondents to participate for years in the merits litigation of a constitutional claim that strikes at the heart of the reliability of petitioner's conviction and sentence of death, and then, after foregoing all previously available opportunities, assert in this Court that every federal court which previously reviewed this case incorrectly reached the merits of petitioner's claim.

ments. Furthermore, the ground for relief was clearly understood to encompass a violation of the constitutional principles set forth in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and related cases, by the federal magistrate, the district court, the panel of the court of appeals and the *en banc* court of appeals.

Had respondents genuinely believed that the *Edwards-Roberson* claim was defaulted in the state courts or not properly presented in the habeas corpus petition, their remedy was to object to the magistrate's report and recommendation when this issue was addressed in detail, and assert that it was *dicta*, or alternatively, that the claim was procedurally barred.[8] Similarly, they raised no objection in either the district court or the court of appeals, even though both courts (including the *en banc* court of appeals) addressed the issue in the precise manner in which it is now presented to this Court. *See* J.A. 119-123; 128-137. Furthermore, respondents did not maintain in their brief in opposition to the petition for writ of certiorari that petitioner's *Edwards-Roberson* claim was barred or otherwise not properly presented in the habeas corpus petition.[9] Respondents' failure to complain

[8] The failure to timely file objections to the magistrate's report and recommendation results in a waiver of any protestation of how that particular issue was resolved by the magistrate. *See Carr* v. *Hutto*, 737 F.2d 433 (4th Cir. 1984); *see also Thomas* v. *Arn*, 474 U.S. 140 (1985).

[9] Because the issue currently before this Court was clearly and accurately presented in the petition for writ of certiorari, and respondents failed to assert in their brief in opposition that the *Edwards-Roberson* claim was not properly preserved below, this Court should not now entertain this belated argument. *See City of Canton, Ohio* v. *Harris*, ____ U.S. ____, 109 S.Ct. 1197 (1989). In *Canton*, respondent argued for the first time in its brief that cer-

at every readily available and appropriate time that this issue was defaulted or not properly raised in the petition for writ of habeas corpus reveals not only the disingenuousness of respondents' argument, but also prevents them from raising this procedural defense now.[10]

II. THERE IS NO PRINCIPLED BASIS TO DISTINGUISH THE FACTS OF PETITIONER'S CASE FROM THOSE IN *EDWARDS* V. *ARIZONA* OR *ARIZONA* V. *ROBERSON*.

In the following section, petitioner replies to respondents' argument that this case is sufficiently distinguishable from *Edwards* and *Roberson* to require a different constitutional result. Initially, however, petitioner notes

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tiorari should be dismissed as improvidently granted because petitioner failed to preserve the question presented for review in the lower courts. This Court rejected respondents' assertion because the "Questions Presented in the petition for writ of certiorari encompass the issue before us in this case." 109 S.Ct. at 1202. Thus the Court concluded that because respondent did not object in its brief in opposition to the petition for writ of certiorari that "the same claim had not been pressed below," it would consider the question as to which certiorari was granted. *Id.* The same result is called for in this case.

[10] While respondents' brief is unclear on this point, they may also be asserting that this Court should not address the merits of petitioner's *Edwards-Roberson* claim because it was not properly pled in his federal habeas corpus petition. If this is respondents' assertion, then it is meritless in light of Federal Rule of Civil Procedure 15(b), which provides, in relevant part: "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they may be treated in all respects as if they had been raised in the pleadings." Thus a complaint, or habeas corpus petition, may be amended by implied consent if the matter is litigated on a particular legal theory without objection by either party. *See Curtis* v. *Loethen*, 415 U.S. 189 (1974); *Harris* v. *Nelson*, 394 U.S. 286, 294 n.5 (1969) (recognizing the applicability of F.R. Civ. P. 15(b) in habeas corpus proceedings).

that in the absence of a cross-petition for *certiorari*, the Court's consideration of this argument is discretionary, *see United States* v. *Nobles*, 422 U.S. 225, 241-42 n.16 (1975), and under the facts of this case should not be entertained. When a case is brought to the Court on a certiorari petition presenting solely an issue of retroactivity and not a question of substantive constitutional law, a practice of allowing the respondent to argue substantive constitutional grounds for affirmance without a cross-petition both strips the Court of control over what constitutional questions it should consider—a control that the certiorari jurisdiction was specifically designed to preserve—and foists upon this Court constitutional issues that it need not decide and therefore should not decide consistent with the fundamental "policy of strict necessity in disposing of constitutional issues." *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568 (1947); *see also Spector Motor Service, Inc.* v. *McLaughlin*, 383 U.S. 101, 105 (1944); *Parker* v. *Los Angeles County*, 338 U.S. 327, 333 (1949); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 72 (1961).

Respondents present two reasons why there was no Fifth Amendment violation in this case. First, respondents assert that when petitioner retained an attorney to represent him as to the "unrelated" assault charge, and when he appeared with that attorney at a bond hearing, he was invoking only his Sixth Amendment right to counsel, and not his Fifth Amendment right. Respondents' Brief at 38-42. Thus, according to respondents, an invocation of the Fifth Amendment right to counsel can only occur in the context of a custodial interrogation. *See* Respondents' brief at 39-40. Second, respondents argue that because petitioner appeared with his attorney at a bond hearing after his arrest, but before the interrogation

which produced the incriminating statement, the requirements of *Edwards* and *Roberson* were satisfied. Respondents' brief at 45-52.

Before addressing each of respondents' contentions, it is important to review the circumstances under with petitioner was arrested and the statement was obtained. Petitioner was originally arrested on the evening of August 30, 1980, on an assault charge—later dismissed—which respondents characterize as "unrelated" to the murder which ultimately resulted in petitioners' conviction and sentence of death. The charge was unrelated, however, only in that it did not involve the same underlying offense as the murder. At the time of petitioner's arrest he was a prime suspect in the murder. The same officers who arrested petitioner for the assault were involved in the investigation of the murder of Pamela Lane, and they had been involved in the investigation since August 24, 1980. J.A. 28-29.[11] Despite this involvement, neither petitioner nor his attorney were informed of this fact when he was arrested, nor at any point prior to the interrogation which led to the incriminating statements involved in this case. *See* Petitioner's brief at 2-4.[12] Petitioner retained counsel, W. McAlister Hill, the next day. Late that evening, a bond hearing was held in conjunction with the assault charge. Petitioner and his counsel were present at the bond hearing. Petitioner was unable to make bond and was returned to the jail. Shortly after counsel left the jail, around

[11] One of the arresting officers, Eugene Frazier, was in charge of the Lane investigation. *Id.*

[12] Petitioner's counsel testified at the post-conviction hearing that he had no idea that petitioner was a suspect in the Lane murder until he was informed that the police had obtained incriminating statements from him. J.A. 65-66.

midnight, Officer Frazier, the same officer who arrested petitioner on the assault charge and who knew that petitioner had retained counsel on that charge, ordered that petitioner be brought to the interrogation room for questioning about the murder of Pamela Lane. Immediately upon being brought into the interrogation room, petitioner was informed that he was being charged with Ms. Lane's murder. J.A. 5. The officers involved in the interrogation were the same officers who arrested petitioner for assault the previous day. During the interrogation, which lasted most of the night, the police obtained two statements regarding petitioner's participation in the crime. Petitioner was not returned to his cell until approximately 10:30 a.m. the next day.

The record unequivocally reveals that petitioner's attorney, Mr. Hill, was not informed and had absolutely no idea that the police planned to interrogate his client that evening. Furthermore, and equally unequivocally, the record reveals that counsel had no idea that petitioner was a suspect in the Lane murder.

1. Petitioner Invoked The Right To Counsel.

Respondents assert that, at most, petitioner's decision to retain counsel to represent him in relation to the assault charge was an invocation of his Sixth Amendment right to counsel and not his Fifth Amendment right. This contention, however, was specifically rejected by this Court in *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986). In *Jackson*, the state asserted that the defendant's request for counsel at his arraignment should not be interpreted to mean that he desired the presence of counsel during any further police initiated questioning. 475 U.S. at 632. In response, this Court stated that it would give a "broad rather than a narrow interpretation to a defendant's

request for counsel." The Court reasoned that a lay person does not understand the difference between the Fifth and Sixth Amendment right to counsel, and thus "'should not be expected to articulate exactly why or for what purposes he is seeking counsel.'" 475 U.S. at 633 n.7 (quoting opinion of the Michigan Supreme Court); *see also Moran* v. *Burbine*, 475 U.S. 412, 420 (1986) (accused has invoked Fifth Amendment right to counsel and is not subject to further police initiated interrogation if he "indicates in any matter, at any time, prior to or during questioning" that he desires the assistance of counsel"); *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (same).[13] Thus, as petitioner affirmatively demonstrated his need for the "'guiding hand of counsel by retaining counsel,'" *see Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964) (quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1938)), and appearing with counsel at the bond hearing prior to the police-initiated interrogation, no serious contention can be made that he did not invoke both his Fifth and Sixth Amendment rights to counsel. *See generally Arizona* v. *Roberson*, 108 S.Ct. 2093, 2096 (1988) (Fifth Amendment right to counsel invoked even though accused did not request counsel during a custodial interrogation). Both the district court and the court of appeals acknowledged as much in their opinions. J.A. 119-120; 129.

It is important to note that respondents are attempting to penalize petitioner for invoking the right to counsel at the earliest possible moment. Because petitioner retained counsel immediately after his arrest on the

[13] This is especially true in cases, such as this one, which involve a defendant with mental retardation. *See* A.B.A. Criminal Justice Mental Health Standards, *Competence and Confessions*, Standards 7-5.8 *et seq.*

assault charge, respondents seek on the basis of that fact alone to narrow the scope of the invocation. This is, as was noted previously, inconsistent with the reasoning utilized by this Court in *Michigan* v. *Jackson*. In respondents' view, the Fifth Amendment right to counsel can never be invoked unless an accused—even if he has previously had counsel appointed or has retained counsel—submits to custodial interrogation and reinvokes the previously asserted right. This hypertechnical construction of the Fifth and Sixth Amendments is contrary to the spirit of this Court's decisions interpreting a defendant's assertion of the right to counsel. *See Roberson*, 108 S.Ct. at 2096; *Moran* v. *Burbine*, *supra*, 475 U.S. at 420 (accused has invoked Fifth Amendment right to counsel and is not subject to further police initiated interrogation if he "indicates in any matter, at any time, *prior to* or during questioning" that he desires the assistance of counsel").

2. The Fact That Petitioner Met With His Attorney Prior To The Interrogation Is Irrelevant And Does Not Defeat Petitioner's Claim.

Respondents also assert that because petitioner had the opportunity to consult with his attorney at a bond hearing held in conjunction with the assault charge, the police were free to reinterrogate him. Respondents' argument relies on a phrase, taken out of context, from this Court's decision in *Edwards* v. *Arizona*, *supra*. The disputed language is as follows:

> We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police.

451 U.S. at 485. This passage from *Edwards* must be examined in the context of *Edwards'* antecedents, and of subsequent decisions clarifying the scope of the protections afforded by the Fifth Amendment. A review of these cases reveals that the language relied upon by respondents can only mean that after an accused invokes the right to counsel, the police cannot question him unless one of two prerequisites is satisfied: 1) the accused must initiate the interrogation; or, 2) the attorney must be notified of the interrogation and be present. *See Miranda*, 384 U.S. 436, 474 (1966) ("[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present"); *Escobedo* v. *Illinois*, 378 U.S. at 481 (same); *see also Moran* v. *Burbine*, 475 U.S. at 423 n.1 (acknowledging that *Edwards* holds that if accused asserts right to counsel that interrogation must cease until either accused initiates interrogation or until attorney is present); *Patterson* v. *Illinois*, ___ U.S. ___, 108 S.Ct. 2389, 2394 (1988) (same); *Roberson*, *supra*, 108 S.Ct. at 2097.

This is entirely logical. As the Court acknowledged in *Roberson*, the invocation of the right to counsel clearly indicates that the accused is unable to "cope with the pressures of custodial interrogation without counsel being present." *Arizona* v. *Roberson*, 108 S.Ct. at 2097. To sanction respondents' parsimonious construction of *Edwards* would run counter to the consistent theme of this Court's right-to-counsel cases, which is that having invoked the right to counsel, the accused is entitled to "rely on counsel as a 'medium' between him and the State." *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985); *see also Michigan* v. *Jackson*, 475 U.S. at 634 n.1 (simple fact that accused asked for an attorney indicates that he does not believe himself "capable of dealing with adversaries singlehandedly"); *Patterson* v. *Illinois*, 108 S.Ct. at 2394

(the purpose of *Edwards* v. *Arizona* was to preserve the integrity of an accused's decision to deal with the policy *only through counsel*).

Respondents would undermine this principle. If respondents are correct, every time a defendant consulted with his attorney, the police then would be authorized to reinterrogate him in his attorney's absence. An accused would be penalized for invoking and exercising the right to counsel, since each consultation with his attorney would subject him to the very peril—custodial interrogation without the presence and assistance of counsel—that he has affirmatively indicated he is "unable to cope with." *Roberson*, 108 S.Ct. at 2100. This perverted interpretation of *Edwards* and *Roberson* cannot be the law, and must be rejected.

At the very least, the police cannot interrogate an individual who has invoked the right to counsel without informing his attorney of the interrogation and its purpose prior to initiating the interrogation. Without this knowledge, an accused cannot meaningfully consult with his attorney and decide whether to talk with the authorities.[14] *Roberson*, 108 S.Ct. at 2101 (accused, "hav-

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[14] Again, and not to belabor the point, this is especially important in a case involving a mentally retarded person such as petitioner. Petitioner's counsel, Mr. Hill, had previously represented petitioner in a civil matter, and thus counsel was well aware of petitioner's mental deficiencies. Hill testified that as a result of petitioner's retardation, Butler looked at Hill as an "authority figure" and "for guidance." *See* Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit at 324-26. Counsel testified that he informed the police not to talk with Horace Butler. J.A. 65. While the police disputed counsel's statement, counsel's concern obviously arose, at least in part, as a result of petitioner's mental limitations. Certainly, had counsel had any idea that petitioner was suspected of committing a murder, he would have taken even greater precautions to protect Butler.

ing requested counsel, can determine how to deal with the separate investigations with counsel's advice"); *see also Satterwhite* v. *Texas*, 486 U.S. 249 (1988); *Estelle* v. *Smith*, 451 U.S. 454 (1981) (counsel must be notified of scope of state ordered psychiatric examination). In petitioner's case, the police did not inform petitioner's counsel that he was a suspect in a murder even though he was at the jail immediately prior to the interrogation. The record reveals that the police intentionally waited until counsel left, in order that they might interrogate petitioner without counsel's knowledge on another charge. This type of police conduct strikes at the heart of this Court's decisions in *Edwards* and *Roberson* and cannot be sanctioned. *See also Maine* v. *Moulton*, *supra*, 474 U.S. at 160 ("knowing exploitation by the state of an opportunity to confront the accused without counsel being present is as much a breach of the state's obligation not to circumvent the right to the assistance of counsel as to the international creation of such an opportunity").

III. *ARIZONA* V. *ROBERSON* IS NOT NEW LAW, BUT RATHER IS MERELY AN APPLICATION OF *EDWARDS* v. *ARIZONA* TO A SLIGHTLY DIFFERENT FACTUAL SITUATION.

Respondents assert that *Roberson*, *supra*, established a new rule of criminal procedure, which pursuant to this Court's decision in *Teague* v. *Lane*, ___ U.S. ___, 109 S.Ct. 1060 (1989), should not apply retroactively. Respondents argue that *Roberson* was "an extension of *Edwards* to separate investigations." Respondents' Brief at 62. Because it was the first decision of this Court to do so, respondents argue that *Roberson* established a new rule. *Id.* In the main, petitioner relies upon the retroactivity discussion contained in his opening brief. However, several points are worth noting here.

First, respondents' interpretation of this Court's decision in *Teague* would, if accepted, make every decision of this Court a "new rule" for retroactivity purposes. In short, respondents assert that if a case is factually distinguishable in any respect from prior precedent, then the application of that precedent would create a "new rule" of criminal procedure.

This radical view of *Teague* was rejected by all nine members of this Court in *Penry* v. *Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934 (1989). While the *Penry* Court divided over whether the application of *Lockett* v. *Ohio*, 438 U.S. 586 (1978) in Penry's case involved a new rule of law, all members of the Court generally agreed that the determination of whether a case involved a new rule for retroactivity purposes must be made in light of the principles established by Justice Harlan in his separate opinions in *Mackey* v. *United States*, 401 U.S. 667, 690-95 (1971), and *Desist* v. *United States*, 394 U.S. 244, 263 (1969). *See Penry*, 109 S.Ct. at 2945; 2964. In those opinions, Justice Harlan affirmatively stated that a case does not create a new rule if it has "'simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" *Mackey*, *supra*, 401 U.S. at 695 (quoting *Desist* v. *United States*, 394 U.S. 244, 263 (1969) (Harlan J., dissenting)). As Justice Harlan recognized in *Desist*, "one need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation." 394 U.S. at 264.

As was set forth in detail in petitioner's opening brief at 9-17, *Roberson* did not create a new rule of criminal pro-

cedure. Rather, it was merely an application of *Edwards* v. *Arizona* to a slightly different set of facts. Any other conclusion would be inconsistent with the retroactivity principles delineated in *Teague* v. *Lane*, *supra*, and other retroactivity decisions of this Court. *See also Yates* v. *Aiken*, 484 U.S. 211, 216 (1988) (*Francis* v. *Franklin*, 471 U.S. 307 (1985), did not announce a new rule of law but was "merely an application of the principle that governed out decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979)"); *Truesdale* v. *Aiken*, 480 U.S. 427 (1987) (per curiam) (reversing a decision of the Supreme Court of South Carolina that denied retroactive effect to *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), and implicitly holding that *Skipper* did not create a new rule of law but only applied the Eighth Amendment principle of *Lockett* v. *Ohio*, *supra*, to a different fact situation).

CONCLUSION

For the foregoing reasons, and for those set forth in petitioner's opening brief, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed and petitioner's case should be remanded with instructions to grant the writ of habeas corpus.

Respectfully submitted,

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